

**IN THE SUPREME COURT OF MISSOURI**

<b>DAVID T. DOUGHTY,</b>	)	
	)	
<b>Petitioner/Appellant,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. SC92261</b>
	)	
<b>DIRECTOR OF REVENUE,</b>	)	
	)	
<b>Respondent.</b>	)	<b>ORAL ARGUMENT REQUESTED</b>

**APPELLANT'S BRIEF**

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### **JURISDICTIONAL STATEMENT**

On or about April 24, 2011 David T. Doughty (hereinafter “Doughty”) received a notice that his driving privileges were revoked for 1 year by the Missouri Department of Revenue (hereinafter “Director”). (L.F. pg. 6). On May 19, 2011 Doughty timely filed, with the Circuit Court of Vernon County, Missouri, a Petition for Review of the Director’s decision to revoke his driving privileges. (L.F. pgs. 3 - 6). On October 24, 2011, Judge Quitno heard Doughty’s Petition for Review in the Circuit Court of Vernon County, Missouri, and entered judgment in favor of the Director and against Doughty, thereby revoking Doughty’s driving privileges for 1 year. (Tr. Pgs. 4 - 11; L.F. pgs. 15 & 16).

Doughty, on December 8, 2011, timely filed, in the Circuit Court of Vernon County, Missouri a Notice of Appeal to this court. (L.F., pgs. 19 -21). After Doughty’s Notice of Appeal was filed with the Circuit Court of Vernon County, Missouri, someone took a pen and placed an “X” in the box for the Western District of Missouri on Doughty’s Notice of Appeal. (L.F. pg. 19). On December 15, 2011, the clerk of the Circuit Court for Vernon County, Missouri filed Doughty’s appeal in the Court of Appeals for the Western District of Missouri. Doughty, on December 20, 2011 filed, in the Missouri Court of Appeals for the Western District of Missouri, a Motion to Transfer this case to this court. On January 4, 2012 the Missouri Court of Appeals for the Western District of Missouri entered an Order and Mandate

transferring this case to this court. This case involves the validity of § 302.312 RSMo., and, therefore jurisdiction is in this court. **Art. V, § 3, Missouri Constitution.**

## **STATEMENT OF FACTS**

The Director Notified Doughty that his driving privileges were revoked for 1 year. (L.F. pg. 5; Respondent's Exhibit 1, pgs. 7 & 9). On May 19, 2011 Doughty timely filed, with the Circuit Court of Vernon County, Missouri, a Petition for Review of the Director's decision to revoke his driving privileges. (L.F. pgs. 3 - 6). On October 24, 2011, Judge Quitno heard Doughty's Petition for Review in the Circuit Court of Vernon County, Missouri. (Tr. Pgs. 1 - 14; L.F. pgs. 15 & 16). The police officer who wrote the reports in the case was subpoenaed to testify. (L.F. pg. 10). The police officer ignored the subpoena and did not appear at court to testify. (Tr. pg. 3, Lns. 7 - 14). The prosecuting attorney requested the court, pursuant to § 302.312 RSMo, to admit into evidence, Respondent's Exhibit 1 which consisted of:

Missouri Department of Revenue Certification

Driver's Privacy Protection Requirements Notification

Order Staying Revocation of Driver License

Petition for Review Dated Filed May 19, 2011

Associate Division Summons Dated Filed May 19, 2011

Notice of Revocation of Driving Privileges

Form 4323 Notice of Revocation of Driving Privileges

Form 2389 Alcohol Influence Report

Citation Report Citation 102163560

Missouri Driver Record Dated 6/6/11. (Resp. Ex. 1, pgs. 1 - 18; Tr. pg. 2; Ins. 14 - 20).

Doughty objected to Respondent's Exhibit number 1 being admitted into evidence on the grounds it violated his constitutional right to due process because he could not confront and cross-examine the witness (i.e., the police officer that prepared the reports and other documents) against him. (Tr. Pg. 2, Ins. 22 - 25; pg. 3, Ins. 13 - 14). The court conditionally admitted Respondent's Exhibit 1, subject to receiving Doughty's brief concerning the due process violation because Doughty not being able to confront and cross-examine the witness(es). (Tr. Pg. 3, Ins. 1 - 8).

On October 31, 2011 Doughty submitted his brief on § 302.312 RSMo, violating his constitutional right to due process because Doughty not being able to confront and cross-examine the witness(es). (L.F. pgs. 11 - 14). On November 1, 2011 the court overruled Doughty's objection to Respondent's exhibit 1 being admitted into evidence and entered judgment in favor of the Director and against Doughty, thereby revoking Doughty's driving privileges for 1 year. (L.F. pgs. 15 & 16).



## **POINTS RELIED ON**

### **POINT I**

THE TRIAL COURT ERRED BY ADMITTING RESPONDENT'S EXHIBIT 1 INTO EVIDENCE BECAUSE THE ADMISSION OF RESPONDENT'S EXHIBIT 1 INTO EVIDENCE VIOLATED DOUGHTY'S CONSTITUTIONAL RIGHT TO DUE PROCESS AS GUARANTEED BY THE 14<sup>TH</sup> AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 10 OF THE MISSOURI CONSTITUTION IN THAT IT DEPRIVED DOUGHTY OF HIS RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.

Goldberg vs. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970)

Jarvis vs. Director of Revenue, 804 S.W.2d 22, 24 (Mo banc 1991)

Dabin vs. Director of Revenue, 9 S.W.3d 610, 615 (Mo banc 2000)

Coyler vs. State Board of Registration for the Healing Arts, 257 S.W.3d 139, 146 (Mo.App. W.D. 2008)

14<sup>th</sup> Amendment to the U.S. Constitution

Article I § 10 Missouri Constitution

§ 302.312 RSMo

§ 577.020 RSMo

§ 577.041 RSMo

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED BY ADMITTING RESPONDENT'S EXHIBIT 1 INTO EVIDENCE BECAUSE THE ADMISSION OF RESPONDENT'S EXHIBIT 1 INTO EVIDENCE VIOLATED DOUGHTY'S CONSTITUTIONAL RIGHT TO DUE PROCESS AS GUARANTEED BY THE 14<sup>TH</sup> AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 10 OF THE MISSOURI CONSTITUTION IN THAT IT DEPRIVED DOUGHTY OF HIS RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.

#### Standard of Review

The constitutionality of a statute is a question of law, the review of which is *de novo*. ***Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007); *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006)**. Whether the trial court erred in admitting testimony is a question of law on appeal. ***South Side Plumbing Co. v. Tigges*, 525 S.W.2d 583, 588 (Mo.App. E.D. 1975)**.

This is a civil case in which Doughty sued the Director to reinstate his driving privileges, after the Director revoked them for one (1) year, because a law enforcement officer alleged Doughty refused to submit to a test of his breath as required by § 577.041 RSMo. ***White v. Director of Revenue* 321 S.W.3d 298, 305 - 307 (Mo. Banc 2010); *Coble v. Director of Revenue*, 323 S.W.3d 74, 77**

**(Mo.App. S.D., 2010).** The rules of civil procedure apply, and, the director has the burden of proving:

- (1) Doughty was arrested or stopped;
- (2) The officer had reasonable grounds to believe Doughty was driving a motor vehicle while in an intoxicated or drugged condition; and
- (3) Doughty refused to submit to a test of his breath, saliva, blood and/or urine. *Id.*; §§ 577.020 & 577.041 RSMo; ***Hinnah v. Director of Revenue, 77 S.W.3d 616, 620 (Mo. banc 2002).***

Any proceeding the purpose of which is the suspension or revocation of a person's driving privilege must be conducted in accordance with procedural due process required by the 14<sup>th</sup> Amendment to the U.S. Constitution. ***Jarvis vs. Director of Revenue, 804 S.W.2d 22, 24 (Mo banc 1991); Dabin vs. Director of Revenue, 9 S.W.3d 610, 615 (Mo banc 2000).*** The process due under the 14<sup>th</sup> Amendment to the U.S. Constitution and Article I § 10 of the Missouri Constitution requires Doughty to be heard in a meaningful manner and at a meaningful time. ***Dabin vs. Director of Revenue, 9 S.W.3d 610, 615 (Mo banc 2000); Coyler vs. State Board of Registration for the Healing Arts, 257 S.W.3d 139, 146 (Mo.App. W.D. 2008).*** Such a hearing requires adequate notice to Doughty that details the proposed action and the reasons therefor, an effective opportunity to defend by confronting and cross-examining any adverse witnesses and Doughty being able to present his own evidence and arguments. ***Goldberg vs. Kelly, 397 U.S. 254, 267-***

**68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970); Willner vs. Committee on Character and Fitness, 373 U.S. 96, 103-04, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963); Greene vs. McElroy, 360 U.S. 474, 496-97, 79 S.Ct. 1400, 1413-14, 3 L.Ed.2d 1377 (1959); Interstate Commerce Commission vs. Louisville & Nashville Railroad Company, 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-88, 57 L.Ed. 431 (1913); Valter vs. Orchard Farm School District, 541 S.W.2d 550, 557 (Mo 1976); Mueller vs Ruddy, 617 S.W.2d 466, 475 (Mo.App. E.D. 1981); Coyler vs. State Board of Registration for the Healing Arts, 257 S.W.3d 139, 146 (Mo.App. W.D. 2008).**

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. **Goldberg vs. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970).**

Doughty's case turned on questions of fact. Doughty testified concerning the issues in the case, and, the prosecuting attorney was permitted to extensively cross-examine him. (Tr. pg. 7, Ins. 3 - 15; pg. 8, Ins. 14 - 25; pg. 9, Ins. 13 - 25; pg. 10, Ins. 1 - 25; pg. 11, Ins. 1 - 11). There were a number of issues where Doughty's testimony varied from the officer's reports, and, Doughty stated the reports were inaccurate (Tr. pg. 12, Ins. 13 - 23). There was no evidence, other than the officer's reports, from which the court could find the officer had reasonable grounds to believe Doughty was driving a motor vehicle while in an intoxicated or drugged condition or

Doughty refused to submit to a test of his breath, saliva, blood and/or urine. (Pgs. 10 - 12, 14 - 16, 19 & 20)

Respondent's Exhibit 1 contains 3 forms in which the officer certified Doughty refused to submit to to a test of his breath, saliva, blood and/or urine. (Ex. 1, pgs. 10 - 12, 14 - 16, 19 & 20). The alcohol influence report states:

(1) Doughty's eyes were watery and bloodshot; (Ex. 1, pg. 10, ctr of page);  
 (2) Doughty emitted a strong odor of alcohol; (Ex. 1, pg. 10, ctr of page);  
 (3) Doughty failed the Horizontal Gaze Nystagmus test; (Ex. 1, pg. 10, bottom one-third ( $\frac{1}{3}$ ) of page on the left); and

(4) Doughty's Preliminary Breath Test was positive for alcohol; (Ex. 1, pg. 10, bottom right hand corner of page);

(5) The officer claimed Doughty admitted drinking 1 beer an hour before the officer stopped him; (Ex. 1, pg. 12, three-fourths ( $\frac{3}{4}$ ) of the way down the page);

The narrative of the Citation Report also contains much of this same information (Ex. 1, pgs. 14 - 16, 19 & 20).

Section 302.312 RSMo provides, in relevant part:

1. Copies of all papers, documents, and records lawfully deposited or filed in the offices of the department of revenue or the bureau of vital records of the department of health and senior services and copies of any records, properly certified by the appropriate

custodian or the director, shall be admissible as evidence in all courts of this state and in all administrative proceedings.

2. A computer terminal printout of an individual driving record through the Missouri uniform law enforcement system from the department of revenue database, certified by an officer of the local law enforcement agency, shall be admissible in evidence in all courts of this state.

The reports and/or other documents prepared by the officer were admitted pursuant to § 302.312, RSMo. (Tr. pg. 2, Ins. 14 - 25; pg. 3, Ins. 1 - 16) The officer was permitted to testify by filling out reports without Doughty being permitted to test the officer's testimony with the crucible of cross-examination. Such a procedure violates Doughty's right to due process as guaranteed by the 14<sup>th</sup> Amendment to the U.S. Constitution. A violation of a litigant's due process rights results in a void judgment. ***Baxi v. United Technologies Automotive, 122 S.W.3d 92, 96 (Mo.App. E.D.2003); Breckenridge Material Co. v. Enloe, 194 S.W.3d 915, 921 fn. # 4 (Mo.App. E.D.,2006).***

### **Conclusion**

Wherefore, for the foregoing reasons, the court should reverse the trial court's admission of the evidence pursuant to § 302.312, RSMo, declare the trial court's judgment suspending Doughty's driving privileges void, remand the case to the Circuit Court with directions to enter a judgment reinstating Doughty's driving

privileges retroactive to the date of the suspension, Order the Director of Revenue to remove from Doughty's driving record the revocation for a chemical test refusal and provide Appellant such other and further relief as the court deems just and proper.

### **CERTIFICATION**

I hereby certify:

1. the claims, defenses, requests, demands, objections, contentions, or arguments contained herein are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. the brief complies with the limitations contained in Rule 84.06(b) and the number of words in the brief is 2,382 according to the word count in WordPerfect X4 which is the word processing system used to prepare this brief.

3. The electronic copy of this brief filed with the court has been scanned for viruses and it is virus free.

Respectfully Submitted,

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Certificate of Service

I hereby certify on May 15, 2012, I served the foregoing on John Winston Grantham, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102 , attorney for Respondent, electronically, by uploading it to the electronic case file.

/s/ R. Todd Wilhelmus  
R. Todd Wilhelmus, attorney for Appellant